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IN THE

Supreme Court of the United States

October Term, 1941

No. 695

JOHN F. CLARK,
Petitioner,

v.

LESTER P. BARLOW, HENRY MORGENTHAU, JR., Secretary of the Treasury, and WILLIAM A. JULIAN, Treasurer of the United States,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT LESTER P. BARLOW IN OPPOSITION, AND APPENDICES CONTAINING THE FINDINGS OF FACTS AND CONCLUSIONS OF LAW OF THE DISTRICT COURT AND THE OPINIONS OF THE COURTS BELOW.

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INDEX.

		PAGE
I	OPINIONS OF THE COURTS BELOW	1
II	JURISDICTION	2
III	STATEMENT OF THE CASE	2
IV	ARGUMENT	12
	SUMMARY OF ARGUMENT	12
	POINT 1. No Fraud or Misrepresentation by Respondent Has Been Alleged or Shown by the Evidence, and Petitioner Was Not Misled or Deceived	14
	POINT 2. Respondent Was Under No Obligation When the Settlement of the New York Cases Was Made and the General Release of Petitioner Executed to Disclose to Petitioner His Dealings With Marlin	19
	CONCLUSION	23

TABLE OF CASES.

Barlow vs. United States, 87 Ct. Cls. 287 and 82 Ct. Cls. 360 10

Jones vs. Simpson, 116 U. S. 609, 615 18

Lalone vs. United States, 164 U. S. 255, 257, 17 Sup. Ct. Rep. 74 18

Patterson vs. Hewitt, 195 U. S. 309 19

Public Motor Service vs. Standard Oil Company of New Jersey, 69 App. D. C. 89 18

Security Investment Company vs. Garrett, 3 App. D. C. 69 18

PAGE

United States vs. Colorado Anthracite Company, 225 U. S. 219, 32 Sup. Ct. Rep. 617 18

United States vs. Parker, 120 U. S. 89 20

Venner, C. H., Company v. Central Trust Company, 294 Fed. 779 19

TABLE OF STATUTES.

Judicial Code, Section 240, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 938, Section 1, United States Code, Title 28, Section 347 (a) 2

Public Law No. 555, 76th Congress, 3rd session 3

Revised Statutes, Section 3477, Title 31, United States Code, Section 203 9

Act of March 3, 1927, 44 Stat. [part 3] 1844 10

RULES OF CIVIL PROCEDURE.

Rule 56 ..... 12, 22

Rule 65 4

APPENDICES.

Appendix A—Opinion herein of the District Court of the United States for the District of Columbia 24

Appendix B—Findings of Fact and Conclusions of Law herein of the District Court of the United States for the District of Columbia 25

Appendix C—Opinion herein of the United States Court of Appeals for the District of Columbia 36

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I

OPINIONS OF COURTS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia is reported at 122 F. (2d) 337 (advance sheets No. 3, October 13, 1941) and will be found at pages 305 to 311 of the record of the Court of Appeals proceedings.* It is also printed as Appendix C

* The record herein is not printed. There are two

hereto. The opinion of the District Court of the United States for the District of Columbia is not reported but will be found at pages 850 and 851 of the record of the District Court proceedings. It is also printed as Appendix A hereto. The Findings of Facts and Conclusions of Law of the District Court are printed as Appendix B hereto.

II

JURISDICTION.

The date of the judgment which petitioner seeks to have reviewed is August 18, 1941 (C.A., R. 312).

Petitioner seeks to invoke the jurisdiction of this court under provisions of Section 240 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, Section 1; United States Code, Title 28, Section 347 (a).

III

STATEMENT OF THE CASE.

Petitioner seeks to have reviewed a judgment of the United States Court of Appeals for the District of Columbia (C.A., R. 312), which affirmed a judgment of the District Court of the United States for the District of Columbia (D.C., R. 872), dismissing an amended complaint (D.C., R. 219) filed by petitioner against this respondent,

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groups of papers with separate pagination. One group of papers is the proceedings in the United States District Court, and the other the proceedings in the United States Court of Appeals for the District of Columbia, both of which were a part of the record in the United States Court of Appeals. Page references herein preceded by the letters C.A., R. refer to pages in the group of papers comprising the Court of Appeals proceedings. Page references preceded by the letters D.C., R. refer to pages in the group of papers comprising the District Court proceedings.

and Henry Morgenthau, Secretary of the Treasury, and William A. Julian, Treasurer of the United States.

In the District Court both the petitioner and this respondent filed motions for summary judgment (D.C., R. 28, 281, 702, 734) under Rule 56 of the Federal Rules of Civil Procedure. Both motions were supported by voluminous affidavits and documentary evidence. None of the material facts was denied by either party. The District Court granted this respondent's motion for summary judgment (D.C., R. 872) and denied petitioner's (D.C., R. 872).

The material facts are as follows:

On September 6, 1940, the President of the United States approved Private Law No. 555, 76th Congress, 3rd session, which provided, so far as material herein, as follows:

"AN ACT

To carry out the findings of the Court of Claims in the case of Lester P. Barlow against the United States.

"*Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to Lester P. Barlow, the sum of $592,719.21, in full settlement of his aerial torpedo patent-infringement claim against the United States as found by the Court of Claims to be due him in its decision of June 7, 1937 * * *"

Lester P. Barlow referred to in this Act is this respondent.

On September 9, 1940, petitioner filed a complaint in the District Court (D.C., R. 1) which he entitled "Suit To Enforce An Equitable Lien and Restrain Defendants". In this action petitioner asserted that he was entitled to one-half of the amount appropriated in the aforesaid Act by reason of a contract executed in Los Angeles by him and this respondent on October 22, 1915 (D.C., R. 231-

233). Petitioner asked the court to restrain the respondents Morganthau and Julian from paying to this respondent, and this respondent from receiving, any of said money "or a sum sufficient to satisfy the claim of the plaintiff to an undivided one-half interest therein", and asking the court to adjudge and decree that the plaintiff was entitled to a one-half interest in the amount appropriated (D.C., R. 5-6).

Although petitioner, in the prayers of his complaint, asked injunctive relief as indicated, he made no application for a restraining order or temporary injunction in accordance with Rule 65 of the Federal Rules of Civil Procedure, or in any other manner, and no restraining order or injunction was ever issued.

This respondent answered the complaint (D.C., R. 7-22) denying that the contract of October 22, 1915, related in any manner to the subject matter of the Act, setting up several other defenses not herein involved, and pleading that any claims which petitioner might have had against this respondent under the contract of October 22, 1915, and any and all claims whatsoever which petitioner might have against this respondent were discharged and settled by the payment by this respondent to petitioner in 1924 of $12,000.00, and the execution of a general release by petitioner dated December 26, 1924 (D.C., R. 23-24).

On October 19, 1940, petitioner, by leave of court, filed an amended complaint (D.C., R. 219) in which he admitted the execution of the release but asserted that it had been secured by the misrepresentations and fraud of this respondent.

Thereafter, the motions for summary judgment were filed by this respondent and petitioner, each motion being supported by numerous affidavits and voluminous documentary evidence. The motions were, upon petitioner's motion, (D.C., R. 740) consolidated for hearing and there being no material issue of fact the District Court granted this respondent's motion (D.C., R. 872) and dismissed

the amended complaint (D.C., R. 872) and denied petitioner's motion (D.C., R. 872).

By the contract of October 22, 1915 (D.C., R. 231-233) between respondent and petitioner, a lawyer, petitioner agreed to furnish legal and other services looking toward the promotion of an aerial bomb, and this respondent assigned to petitioner a one-half interest in a bomb identified in the contract as one which this respondent was "about to apply for patent upon and a drawing of which are [*sic*] now in the possession of J. F. Clark" (D.C., R. 231).

Subsequently, after various incidents in California which are not material to the issue involved herein, this respondent came East and over a period of years invented new and different bombs.

On January 29, 1918, this respondent entered into a contract with Marlin-Rockwell Corporation (D.C., R. 38-50), hereinafter referred to as Marlin, by which this respondent assigned to Marlin the inventions upon the new bombs, patents for which, when issued, were to be the property of Marlin. In consideration of this assignment Marlin agreed to pay to this respondent 49 per cent of all royalties as and when the same should be received by Marlin for the manufacture by it or by others of aerial munitions under the applications for patents or the patents. Marlin agreed that the royalties to be paid to Barlow should amount to at least $50,000 each year, but it did not guarantee this payment. However, it was agreed that should the payments by Marlin amount to less than $50,000 in any year this respondent should have the right to cancel the contract in its entirety upon ten days written notice to Marlin and compliance with other conditions; whereupon Marlin was required to reassign all applications for patents and patents to respondent (D.C., R. 41 and 43).

Thereafter the six patents herein involved were issued to Marlin, four of them being issued on September 30, 1919 and two on October 14, 1919 (D.C., R. 30 and 63).

Prior to the foregoing a dispute had arisen between

petitioner and this respondent, petitioner asserting that these patents were covered by the contract of October 22, 1915, and respondent asserting that they covered inventions entirely different from the inventions referred to in that contract. This respondent by letter of October 25, 1916 (D.C., R. 575-576) and telegram of May 6, 1918 (D.C., R. 605) advised petitioner that petitioner had no interest in the new inventions or in the patents thereof, and suggested that if petitioner thought he had any rights therein, he should take proper legal proceedings to enforce his alleged claims.

Payments to this respondent having become due under this respondent's contract with Marlin of January 29, 1918, petitioner made demand upon Marlin for payment of one-half of any amounts accrued. Because of petitioner's demands upon Marlin, this respondent on October 18, 1918 (D.C., R. 145-176) instituted an action in the Supreme Court of New York, New York County, against Marlin to enforce payments under his contract (D.C., R. 38-50). On February 24, 1919, petitioner by order of the court (D.C., R. 158-161) was joined in the action as a party defendant, and thereafter filed an answer in the action wherein he asserted a counterclaim for one-half of all monies then due or thereafter to become due under the contract between this respondent and Marlin (D.C., R. 162-170). Petitioner asserted that he was entitled to this relief under the terms of the contract of October 22, 1918.

In petitioner's counterclaim in that action he made the following allegations (D.C., R. 167-168):

> "XVI. Upon information and belief, that the said defendant John F. Clark has duly demanded of the plaintiff that he assign to him a one-half interest in and to said bomb and improvements thereon, together with a one-half interest in all patents, and rights in applications for patents upon the said bomb and improvements thereon and a one-half interest in all and any moneys received and to be received as royalties

or otherwise, from the sale, manufacture or use of said bomb or improvements thereupon; but that the plaintiff has refused and still refuses to assign to the said defendant, John F. Clark, a one-half interest as aforesaid, or any interest whatsoever.

* * * * *

"4. That he is entitled to a one-half interest in and to all moneys received or to be received by the plaintiff from the Marlin-Rockwell Corporation, or from any other source whatsoever, as royalties, or otherwise for the sale, manufacture, and use of the said bomb and improvements thereon."

The inventions and patents involved in the action in the Supreme Court of New York were the same patents and inventions herein involved and to compensate for the infringement of which the Private Law No. 555, *supra*, was passed.

The action in the Supreme Court of New York was tried and the special verdict of a jury set aside by the court (D.C., R. 147). An appeal was prosecuted by petitioner to the Appellant Division of the Supreme Court of New York from the order setting aside the verdict.

On April 25, 1921, this respondent instituted an action of the same character in the United States District Court for the Southern District of New York against Marlin (D.C., R. 177-179) to recover additional amounts which had accrued since the filing of the action in the New York Supreme Court. Petitioner, who was made a party defendant to that action, filed an answer and counterclaim (D.C., R. 181-189) setting up a claim to one-half of those amounts, asserting that the one-half of the amounts was payable to him under the contract of October 22, 1915. This action was tried in the United States District Court but no decision was ever rendered by the court because of the circumstances hereinafter related.

During the pendency of the New York State Court action and the action in the United States District Court for the

Southern District of New York, negotiations were entered into between petitioner and this respondent, through their respective counsel and attorneys, for the settlement of the said actions and all disputes and claims existing between them (D.C., R. 147-154).

Thereafter a settlement was duly agreed upon whereby petitioner was to be paid $12,000 in cash conditioned upon the discontinuance of his counterclaims in the aforesaid actions, filing of stipulations by the parties in the same actions to effect such discontinuance, and the execution of a release by the petitioner herein of all claims, present and future, of any kind, character or description which he might have against this respondent.

Thereafter the following stipulation was signed by the petitioner and this respondent and filed in those actions (D.C., R. 151):

> "IT IS HEREBY STIPULATED, that the defendant, John F. Clark, settles all claims against Lester P. Barlow, by the payment to him or his attorney by Barlow in the sum of $12,000. Said Clark hereby releases the balance of said funds, and further covenants and agrees to execute and deliver to Lester P. Barlow a general release of all claims and causes of action whatsoever. Upon payment of said money, said Clark through his attorney will sign a consent to discontinue the above actions without costs to any party as against the others. The sum of $12,000 to be paid upon the delivery of the general release by the defendant, Clark."

Pursuant to the terms of the stipulation, petitioner received the specified $12,000 and on December 26, 1924, executed and acknowledged a release of which the following are the material parts (D.C., R. 151-154):

> "TO ALL TO WHOM THESE PRESENTS SHALL COME or may concern, greeting; know ye, That John F. Clark, of the City of Los Angeles, County of Los Angeles, and State of California, for and in consid-

eration of the sum of Twelve Thousand Dollars lawful money of the United States of America, to me in hand paid by Lester P. Barlow, the receipt whereof is hereby acknowledged, have remised, released and forever discharged and by these Presents do for myself heirs, executors and administrators, remise, release and forever discharge the said Lester P. Barlow, his heirs, executors and administrators, of all and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever in law or in equity, which against him, I, John F. Clark, ever had, now have or which my heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause, or thing whatsoever from the beginning of the world to the day of the date of these presents. . . ."

The Marlin Company having become financially embarrassed in 1923 and unable to proceed under the terms of the contract of January 29, 1918, *supra*, this respondent entered into a settlement agreement with that company by the terms of which he released all his claims against the company in consideration of a re-assignment to him of all of the patents upon his inventions which had been issued to the Marlin Company together with an assignment by the Marlin Company to him of a claim against the United States for the use of the inventions while they were owned by the Marlin Company (D.C., R. 254 and 64).

The settlement between this respondent and the Marlin Company occurred on August 3, 1923 (D.C., R. 254 and 64), subsequent to the trial of the New York action, but prior to the settlement between this respondent and petitioner on December 26, 1924.

The assignment to this respondent by Marlin of the claim against the United States being invalid by statute (R. S. Section 3477, 31 U. S. C. A. Section 203), this

respondent applied to the United States Congress for relief and as a result of his application the Act of March 3, 1927 (44 Stat. [Part 3] 1844) was passed and approved. This Act validated the assignment and authorized suit upon the claim by this respondent in the United States Court of Claims.

Thereafter respondent instituted suit in the Court of Claims which, after extended litigation, determined the amount due to this respondent (D.C., R. 139) upon the claim which had been assigned to him by Marlin (*Barlow* v. *United States*, 87 Ct. Cls. 287 and 82 Ct. Cls. 360).

The court having no power, under the special act conferring jurisdiction, to render judgment referred its findings to the Congress which on September 6, 1940 passed, and it was approved, the Act quoted at the outset awarding to this respondent $592,719.21.

The record shows, and it is conceded by all parties, that the patents for the infringement of which the aforesaid amount was awarded by Congress are the same patents which were the subject matter of the litigation between this respondent and petitioner in both the New York Supreme Court and the United States District Court for the Southern District of New York.

After the approval of the Act of September 6, 1940, petitioner instituted the action in the District Court of the United States for the District of Columbia as hereinbefore described.

In that suit petitioner admitted the execution of the stipulation settling the New York litigation and the execution of the general release of December 26, 1924, but claimed that he was induced to execute the release because of certain testimony which this respondent had given upon cross-examination in 1921 at the trial of the action in the Supreme Court of New York. This testimony is as follows:

1 Q. Have you received anything for your depth bomb?
A. Nothing.

2 Q. Have you received anything for any aerial bombs from the government?
A. No.
3 Q. No royalties?
A. I waived my royalties to the Secretary of War—I wrote him a letter.
4 Q. Did you ever get patents on any of these articles?
A. Yes.
5 Q. Do you own the patents now?
A. Yes, they are here.
6 Q. Do you own patents in any foreign governments?
A. No.

Both of the lower courts have found that this testimony was not false (see Appendix B), and that the testimony was not intended to and did not in any way deceive or mislead petitioner (D.C., R. 867-869, and Appendix B hereto; C.A., R. 305-311). At the trial of the New York actions petitioner had offered and there was received in evidence the contract of January 29, 1918, *supra*, between this respondent and Marlin.

The following recital in that contract demonstrates that one of the purposes of the contract was to enable Marlin to manufacture bombs under the patents which were to be issued to it upon this respondent's inventions for sale to the United States Government, to wit, (D.C., R. 39):

> "Whereas, since the execution of the aforesaid contracts a state of war has been declared and now exists between the United States of America and the Imperial German and the Imperial and Royal Austro-Hungarian Governments, constituting a national emergency, and in the prosecution of which there will be required quantities of aerial munitions; and
>
> "Whereas, the United States Government, in the exercise of its sovereign rights in such a national emergency, is in the purchase of such aerial munitions fixing the amount of royalty to be paid to the owner of patents, and is also fixing the amount of manufacturing profit on such a basis as to make it unprofitable for Marlin to manufacture aerial muni-

tions upon a division of said manufacturing profit with Barlow * * *."

At the time the testimony, which it is asserted misled the petitioner into the execution of the general release, was given it was known to petitioner that Marlin was the owner of all the patents involved, that this respondent had no claim against the United States for the infringement of the patents which were owned by Marlin, that any payments to this respondent would be payments made by Marlin pursuant to the contract of January 29, 1918, and that this respondent could not, legally or otherwise, waive any claim to royalties against the United States as to these inventions since such claim, if any, was a claim of Marlin.

In addition to the claim that he was misled by the respondent's testimony, petitioner also claims that there was an obligation upon this respondent to disclose to him before the execution of the general release that Marlin had assigned its claim against the United States to this respondent.

IV.

ARGUMENT.

Summary of Argument.

Point 1. In the District Court both this respondent and petitioner filed motions for summary judgment. These motions were supported by affidavits and documentary evidence. Each of the parties had full opportunity to submit any facts bearing upon the issues. It does not appear that petitioner possessed any other evidence which he could produce to support his contention that the stipulation and release executed by petitioner were induced by fraud. There was no denial of any material fact by either of the parties. There was "no genuine issue as to any material fact", (Rule 56 (c) of the Federal Rules of Civil Procedure) and the District Court found as a fact that there

was no fraud or misrepresentation by the respondent. The Court of Appeals affirmed the finding of the District Court. Under these circumstances this respondent was entitled, as a matter of law, under the rule cited to judgment dismissing the complaint. Conceding the truth of all evidence offered by petitioner there were no facts upon which a finding can be based that petitioner was misled or deceived into executing the release of December 26, 1924.

The facts conclusively show that petitioner was not in fact misled or deceived into executing the release of December 26, 1924.

Point 2. A dispute arose between petitioner and respondent in 1916 as to whether petitioner, under the contract of October 22, 1915, had any interest in the patents involved in this litigation. This respondent denied such interest and notified petitioner that the contract of October 22, 1915 had no reference to any of the patents involved. This issue was raised in the actions in the Supreme Court of New York and in the United States District Court for the Southern District of New York. These actions as well as all other claims which petitioner might have against respondent were settled by agreement, petitioner was paid $12,000 and executed a release of all claims, including claims under the contract of October 22, 1915, which he had or might have against respondent. The issue in the New York cases being whether petitioner possessed any rights against this respondent and whether this respondent was under any fiduciary duty to petitioner, and respondent denying any such rights and any fiduciary relationship, there was no duty of disclosure of any kind upon this respondent when the negotiations for the settlement of all claims were in progress. The release, coupled with the discontinuance of the New York actions, cannot be set aside on the ground that this respondent who executed the release did not have information which he might have obtained had he carried the litigation to a

successful conclusion. If the rule is otherwise a settlement could never be made of an action involving a demand for accounting.

POINT 1

No Fraud or Misrepresentation by Respondent Has Been Alleged or Shown by the Evidence, and Petitioner Was Not Misled or Deceived.

The issue before the Court hereunder is as follows:

> "Is the general release executed by the petitioner in 1924, and the receipt by him of $12,000 in consideration of the execution thereof, coupled with the settlement and discontinuance of the suits in New York in which petitioner asserted a half interest in the patents here in question, a bar to this action?"

Both the District Court and the Court of Appeals have answered this question in the affirmative.

Petitioner's contention is that the release was obtained by fraud because this respondent failed to disclose the possibility of a claim against the United States and because he was in some manner deceived by this respondent's testimony in one of the New York cases.

The questions and answers in the New York State trial which the petitioner says deceived him should be read in the light of the admitted fact that this respondent was being cross-examined by petitioner's counsel for the purpose of ascertaining from what source, if any, *other than the Marlin-Rockwell Corporation*, patent royalties were due, (District Court's Finding of Facts, D.C., R. 866; Appendix B, hereto) and other facts which were known to all parties to that action because of the pleadings and exhibits.

Following are the questions and answers, with a notation after each answer in parenthesis to show what other facts were known to all parties to the litigation at the time:

1 Q. Have you received anything for your depth bomb?

A. Nothing.

2 Q. Have you received anything for any aerial bombs from the government

A. No. (That sums had been received by this respondent from Marlin was known to all parties to the litigation and these payments were the subject matter of the suit. The purpose of the question was to determine whether this respondent had received sums from any other source than Marlin and this respondents answer was responsive and true).

3 Q. No royalties?

A. I waived my royalties to the Secretary of War—I wrote him a letter. (Everyone connected with the litigation knew this respondent had no authority to waive royalties due from the United States to Marlin and that a large number of this respondent's patents had been assigned to Marlin. They knew he had not waived his rights under the contract with Marlin because the sums due under that contract were the subject matter of the suit. As in the previous questions, the purpose of the question was to determine whether this respondent had received sums from any sources other than Marlin and this respondent's answer was responsive and true).

4 Q. Did you ever get patents on any of these articles?

A. Yes. (All parties knew, of course, that all the rights to patents here in question had been assigned to Marlin. The assignment contract and the patents were all before the courts as exhibits offered by petitioner).

5 Q. Do you own the patents now?

A. Yes, they are here. (Certified copies of all the patents were in the case as exhibits offered by petitioner. He and every one else concerned knew, of course, that they had been assigned to and were owned by Marlin).

6 Q. Do you own patents in any foreign countries now?

A. No.

The Court of Appeals in discussing these questions and answers thereto had the following to say in its opinion:

> "Again, appellee's answers on cross-examination fail to show concealment, in any event. Anyone who is familiar with court-room practice is well aware of the rapid-fire manner in which cross-examination takes place. At the New York trial, appellee was asked whether he had received anything for aerial bombs from the Government. Appellant's counsel, in asking the question, well knew that Marlin-Rockwell had received something, and that appellee had received a portion thereof. He and appellant both understood, therefore, that appellee's answer excepted payments made to Marlin-Rockwell Corporation. It was then that appellee volunteered the statement: 'I waived my royalties to the Secretary of War * * * I wrote him a letter.' The conclusion is inescapable that appellant knew this statement also excepted payments made to Marlin-Rockwell Corporation by the Government, *which payments had been in part distributed to appellee and which constituted the very substance of the trial then under way.* Moreover, appellee's statement, thus volunteered, even as it related to other royalties on future contracts, *far from constituting concealment, was, instead, a revelation of information.* It amounted to an invitation to inquire further as to the nature and contents of the letter. But appellant's counsel did not accept the invitation. He, not appellee, was in control of the examination, and he chose to go forward to another subject: 'Did you ever get patents on any of these articles?'" (Italics supplied.)

Nevertheless, petitioner asks this Court to believe that in some mysterious manner he was deceived by this respondent's testimony. This raises the question whether petitioner could have been deceived, even if he honestly misunderstood this respondent's testimony.

The entire basis of petitioner's claims of fraud and nondisclosure is that he made a settlement with this respondent without knowledge that there might be future payments

due from the United States. It is true, of course, that the petitioner did not know how much might in the future become due to this respondent from the Marlin Company or any other source. Neither did this respondent. At the time the settlement was made petitioner knew that the Marlin Company had been selling bombs to the United States and that further sums would become due from the United States to the company. He knew that this respondent was entitled to receive a minimum of $50,000 a year under his contract with Marlin and not less than 49 per cent of all royalties received by Marlin, so long as the contract remained in force, and that between the time of the trial of the New York suit and the settlement between petitioner and this respondent an additional obligation of approximately $200,000 from Marlin to this respondent might have accrued. In the light of those facts he accepted $12,000 and gave a general release. Now he claims he was deceived because this respondent exchanged his doubtful $200,000 claim against the Marlin Company for a claim against the United States which, though even more doubtful at the time, turned out to be worth nearly $600,000.00, due to 22 years of ceaseless work by this respondent to which petitioner contributed neither time, effort, nor money.

This respondent was forced to pay off petitioner once after his money from the Marlin Company was held up by five years of litigation. Petitioner knew exactly what he was doing in 1924 when he settled for $12,000.00, but now that additional sums have been paid to this respondent, he would like to be paid off again.

It is a well established principle that he who alleges fraud and relies upon it for relief must prove it by convincing evidence. The courts never presume fraud. The courts have often held that a party relying upon fraud must show that the misrepresentations asserted were made

either with knowledge of their untruth or in reckless disregard of the truth.

United States v. *Colorado Anthracite Company*, 225 U. S. 219, 32 Sup. Ct. Rep. 617.

Jones v. *Simpson*, 116 U. S. 609, 615.

Lalone v. *United States*, 164 U. S. 255, 257, 17 Sup. Ct. Rep. 74.

Security Investment Company v. *Garrett*, 3 App. D. C. 69.

Public Motor Service v. *Standard Oil Company of New Jersey*, 69 App. D. C. 89.

In the case at bar the statements relied upon as inducing the alleged fraud were true and there is no evidence that there was any intention to deceive. Every inference is the other way.

Even if a fiduciary relationship did exist between petitioner and this respondent, which is denied by this respondent, no fact was not disclosed to the petitioner which he could not have deduced as likely or certain to occur from a mere reading of the Barlow-Marlin contract of January 29, 1918. Nothing took place between the time of the trial in the New York State Court in 1921 and the settlement in 1924 which if known to petitioner could have in any way influenced him in making a settlement of the cases. This respondent merely exchanged a doubtful claim against Marlin of which petitioner knew for an equally or more doubtful claim against the United States.

Petitioner could have computed from the contract that an additional sum of approximately $200,000 had become due from Marlin to this respondent between the time of the trials in New York and the execution of the settlement, or that the patents had reverted back to this respondent under the contract.

POINT 2

Respondent Was Under No Obligation When the Settlement of the New York Cases Was Made and the General Release of Petitioner Executed to Disclose to Petitioner His Dealings With Marlin.

It is submitted that on the facts there was no fraud on the part of this respondent and that even if a fiduciary relationship did exist, there was no concealment or nondisclosure of any fact which could have influenced petitioner in agreeing to the settlement.

Even if the contract of October 22, 1915, created an express trust, the repudiation of petitioner's claims in 1916 terminated any fiduciary obligations upon this respondent, upon the lapse of a reasonable time after the repudiation, in which the petitioner might have enforced his claims by suitable action.

Patterson v. *Hewitt*, 195 U. S. 309.
C. H. Venner Company v. *Central Trust Company*, 294 Fed. 779.

When petitioner's claim was finally brought into court by interpleader in the New York suits, he asserted a right to an accounting of the benefits received by this respondent under these patents. A necessary element in the proof of these claims would have been the establishment of the fact that a fiduciary relationship existed between the petitioner and this respondent by reason of the contract of October 22, 1915. The assertion of such a fiduciary relationship was the gravamen of the alleged cause of action upon which the suits were based.

The settlement here in question was something more than a mere release of claims. It was a compromise and settlement of existing suits because it included not only the payment of $12,000.00 by this respondent, the execution of a complete release of all claims and causes of action by the petitioner, but also a stipulation for the discontinu-

ance of the suits in New York, in which the terms of the settlement were set forth.

The dismissal or discontinuance of a suit by agreement in which the cause of action is specifically waived and abandoned is a bar and estoppel of any future litigation.

United States v. *Parker*, 120 U. S. 89.

The causes of action in New York asked for an accounting on the ground that a fiduciary relationship existed between the parties. This respondent refused such an accounting and denied the existence of such a relationship. The settlement of those suits in the manner in which they were settled is a complete bar to any further assertion of rights on the ground that a fiduciary relationship did exist and a reassertion of the claim that a fiduciary relationship existed cannot be used in an attempt to set aside a settlement of suits in which that very question was proposed to be litigated.

These legal considerations are relatively unimportant, however. The facts are plain that the petitioner was not deceived or misled in any way in making a settlement with this respondent in 1924, and both the District Court and the Court of Appeals have so found.

No claim was advanced by the petitioner in the District Court that there was any issue as to material facts on the motion for summary judgment. No such claim (D.C., R. 875-878) was advanced in the Court of Appeals until after that court had rendered an opinion in favor of this respondent. This question was first raised on motion for re-hearing in the Court of Appeals.

It will be noted, furthermore, that nowhere in the petitioner's brief does he point to any specific issue of fact. He says on page 11 of his brief, in his first specification of error, "that there were genuine issues as to material facts concerning the validity of the stipulation and general release pleaded on accord and satisfaction in this case". The same allegation that there were issues of material

fact is again made in general terms, without a specification of what those facts are, in specifications of error V on page 12 of the petitioner's brief. In his appeal from the District Court of Appeals, however, he made no such assignment of error.

There is no question of fact involved here. This petitioner gave the testimony in question. No allegation has been made at any point in the litigation that any answer was false. The petitioner alleges at one place in his petition that this respondent admits that he gave this "*false testimony*". This is not true. This petitioner admits he gave the *testimony*, but no evidence has been offered that any part of it is false, and the District Court found that it was not false. There is no issue of facts as to the circumstances under which the testimony was given or the information which was before both the petitioner and this respondent in the form of the pleadings and exhibits in the case in which the testimony was given. The only issue was whether there was anything in this testimony in the light of circumstances of which both parties were aware which could have deceived the petitioner.

The District Court in its opinion on the motion for summary judgment said (D.C., R. 850, and Appendix A hereto):

> "I do not find any false statements in the testimony of the defendant in the New York cases."

The petitioner in asking for a judgment, notwithstanding this opinion, did not allege that there were any issues of fact. He gave the following grounds for his motion for judgment notwithstanding the opinion (D.C., R. 860):

> "* * * plaintiff states that under all the pleadings, exhibits, affidavits, depositions on file in this case together with the admissions of defendant Barlow in response to plaintiff's requests for admissions duly served upon him the said Barlow is not entitled to summary judgment in this case, but on the contrary

thereof plaintiff Clark is entitled to summary judgment herein."

Subsequently the District Court made findings of facts and in paragraph 16, (see Appendix B hereto) after quoting the testimony quoted above, found:

"16. No allegation was made herein and no evidence offered that said testimony of the defendant Barlow was false. Said testimony was not false."

Still later when petitioner filed in the District Court a "Statement of the Points in which he intends to rely on the appeal from the District Court Judgment of January 29, 1941", he again omitted to mention any issues of fact.

It is surprising also that if there had been any issues of fact that the petitioner would have himself moved for summary judgment as to the two defenses of laches and accord and satisfaction raised by this respondent in his motion for summary judgment. Both petitioner and respondent moved for summary judgment on the facts before the District Court on these two defenses. *The petitioner by filing such a motion, under Rule 56 (a) and 56 (c) of the Rules of Civil Procedure, said to the court that there was "no genuine issue as to any material fact"* so far as the defense of laches and accord and satisfaction are concerned and it does not lie in his mouth now to say that there are such issues of fact after the case has been decided in the District Court and the District Court's decision has been affirmed on appeal.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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